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**BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO**

In the Matter of the Application of Ohio)
Edison Company, The Cleveland Electric)
Illuminating Company and The Toledo)
Edison Company for Authority to) Case No. 10-388-EL-SSO
Establish a Standard Service Offer)
Pursuant to R.C. § 4928.143 in the Form)
of an Electric Security Plan.)

**JOINT MEMORANDUM CONTRA FIRSTENERGY'S MOTION FOR
WAIVER OF RULES**

**BY
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NATURAL RESOURCES DEFENSE COUNCIL,
NORTHWEST OHIO AGGREGATION COALITION,
NORTHEAST OHIO PUBLIC ENERGY COUNCIL,
AND THE
OHIO ENVIRONMENTAL COUNCIL**

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I. HISTORY OF THE CASE

The undersigned members of the Ohio Consumer and Environmental Advocates (“OCEA”) herein respond to the Motion for Waiver of Rules (“Motion”) that Ohio Edison Company, the Cleveland Electric Illuminating Company, and the Toledo Edison Company (collectively, “FirstEnergy” or the “Companies”) filed with the Public Utilities Commission of Ohio (“PUCO” or “Commission”) on March 23, 2010, at 5:28 p.m., after the Companies initiated this case by filing an application (“Application”) at 5:27 p.m. FirstEnergy attached to its Application a Stipulation and Recommendation (“Stipulation”) that requests Commission approval of the Application by May 5, 2010.¹ Under

¹ Stipulation at 2. The demand is repeated in the Motion. Motion at 1.

FirstEnergy's proposed timeline there is precious little time for parties contesting the Stipulation to prepare and present their cases to the Commission to achieve a better result for Ohioans and under FirstEnergy's proposed waivers there would be precious little information available for certain of the requirements that the PUCO established in its rules for filing such an Application. The undersigned parties oppose many of the specific waiver requests as well as the general request for waivers contained in the Motion.

II. STANDARD OF REVIEW

Ohio Adm. Code 4901:1-35-02(B) allows for waivers of the PUCO's filing requirements where "good cause is" shown. In a recent case involving Aqua Ohio, Inc.,² the Commission applied this standard of "good cause" in considering waiver requests under the Standard Filing Requirements in a rate cases under R.C. Chapter 4909.³ In *Aqua*, the Commission's consideration of various waivers (and denial of waivers) included whether the information subject to the waiver request was "necessary for an effective and efficient investigation."⁴ In determining whether there is good cause to grant FirstEnergy's Motion, the Commission should consider, *inter alia*, whether certain of the information the Companies ask not to file is nonetheless necessary for parties (and the Commission) to make an effective and efficient review of the Application.

In this case under R.C. Chapter 4928, there is no requirement for a Staff report and the PUCO Staff joined in the filing of the Application. Under the circumstances, parties bear even more burden to provide for an "effective" review of FirstEnergy's

² *In re Aqua Ohio*, Case No. 09-560-WW-AIR, Entry at ¶7 (July 29, 2009) ("*Aqua*").

³ Ohio Adm. Code 4901-1-07 (Appendix A).

⁴ *In re Aqua Ohio*, Case No. 09-560-WW-AIR, Entry at ¶¶9 and 11 (July 29, 2009).

proposals. And considering the compressed timeline FirstEnergy proposes, as apparently accepted in the Attorney Examiner's Entry dated March 24, 2010, the need to be "efficient" is extremely important. Therefore, the PUCO's standard for judging whether there is good cause to grant FirstEnergy's waiver requests should include whether the information FirstEnergy ask not to file is nonetheless necessary for other parties (and, ultimately, the Commission) to make an effective and efficient review of the Application.

III. ARGUMENT

A. Waiver Requests Should Be Denied.

1. Certain Specific Waiver Requests Should Be Denied For Lack of Good Cause.

a. Ohio Adm. Code 4901:1-35-03(C)

FirstEnergy failed to argue that the requirement, stated in Ohio Adm. Code 4901:1-35-03(C)(2), to provide pro forma financial projections and related testimony on the effect of the ESP "for the duration of the ESP" is unimportant or unnecessary in the context of this case. The financial impact on the electric utilities is important to understand the role played by hundreds of millions of dollars in distribution collections that are possible under the Stipulation.⁵ The information could be useful for purposes of applying the significantly excess earnings test.⁶ The Motion merely states that the information is not available "upon the filing of the[] Application."⁷ The waiver should surely not be granted merely because FirstEnergy has not prepared the information, a

⁵ Stipulation at 13-17.

⁶ R.C. 4928.143(F). FirstEnergy also applied for waiver of the requirements under Ohio Adm. Code 4901:1-35-03(C)(10) related to the significantly excess earnings test. Motion at 4.

⁷ Motion at 2.

situation where FirstEnergy has clearly not stated good cause for its waiver request.

Granting such a request would set an extremely poor Commission precedent.

FirstEnergy's argument favoring waiver of Ohio Adm. Code 4901:1-35-03(C)(6)⁸ is vacuous regarding an important change proposed by FirstEnergy regarding nonavoidable charges. The rule amplifies the requirement stated in R.C. 4928.20(K) that the Commission must "consider the effect on large-scale governmental aggregation of any nonbypassable generation charges." According to the Stipulation, the reconciliation rider, Rider GCR, would change from a bypassable charge under the terms of the existing ESP to a non-bypassable charge under circumstances described in the Stipulation.⁹ Those circumstances might change from month-to-month, providing for instability regarding the terms under which aggregation could proceed (or, due to the instability, not proceed). Those circumstances would also include instances where FirstEnergy's projections, unsupervised by the Commission, would trigger unavoidable charges.¹⁰ FirstEnergy's argument for the provisions in its Stipulation -- i.e., it is "beneficial for all customers"¹¹ -- should be reserved for its brief. The argument is inappropriate in support of a waiver request, and the request should be denied as lacking good cause.

FirstEnergy's request for waiver of Ohio Adm. Code 4901:1-35-03(C)(8) regarding whether the Application supports State policy is nothing less than argument against the Commission's rule. FirstEnergy states that it should not be required to discuss

⁸ Id. at 3.

⁹ Stipulation at 11-12.

¹⁰ Stipulation at 12 ("Companies may convert Rider GCR to a non-avoidable charge provision if they believe").

¹¹ Motion at 3.

State policy because “those policies can conflict in practice.”¹² The time for argument against the promulgation of the Commission’s rule is long past. The waiver request should be denied.

b. Ohio Adm. Code 4901:1-35-04

The notice for newspaper that FirstEnergy addresses with regarding to Ohio Adm. Code 4901:1-35-04¹³ is closely connected with a statutory requirement, which may not be waived.

The commission shall set the time for hearing of a filing under section . . . 4928.143 [i.e. an ESP filing] of the Revised Code, send written notice of the hearing to the electric distribution utility, and *publish notice in a newspaper of general circulation in each county in the utility’s certified territory.*¹⁴

Ohio Adm. Code 4901:1-35-04(B) elaborates on this statutory requirement and requires the ESP applicant to submit “a proposed notice for newspaper publication that fully discloses the substance of the application, including rates impacts, and that prominently states that any person may request to become a party to the proceeding.” However, the procedural schedule stated in the Entry dated March 24, 2010 cuts off interventions on April 5, 2010, without any arrangements whatsoever to notify the public in advance regarding this case.¹⁵

¹² Id.

¹³ Id. at 5.

¹⁴ R.C. 4928.141(B) (emphasis added).

¹⁵ Entry at 3, ¶(6)(c) (March 24, 2010).

FirstEnergy's statement that it will follow newspaper publication requirements "ordered by the attorney Examiner(s)" should not need to be stated.¹⁶ That statement, however, entirely misses the point of Ohio Adm. Code 4901:1-35-04(B). The Commission's rule requires *FirstEnergy* to draft a proposed notice for publication. With the assistance of any commenting parties, the Commission could thereafter approve such a draft notice or make edits and arrange for *timely notice to the public that invite persons to become party to the case*. FirstEnergy's request for waiver of this rule appears calculated to deprive the public of the statutorily required notice.

Approval of FirstEnergy's Motion would deprive interested parties of any opportunity to comment upon the newspaper notice. The notice, which should contain information that will be echoed in the announcement of local public hearings,¹⁷ should state the following:

The FirstEnergy Companies of Ohio Edison Company, The Cleveland Electric Illuminating Company, and The Toledo Edison Company filed an application on March 24, 2010 in Case No. 10-388-EL-SSO to establish rates for electric generation, transmission, and distribution service. The application is on file at the Public Utilities Commission of Ohio's offices, 180 East Broad Street, Columbus, Ohio 43215-3793, and can be viewed on the Commission's web page at <http://www.puc.state.oh.us>. A hearing will commence on April 20, 2010 at 10:00 a.m., 11th Floor Hearing Room 11-A. Any person may request to become a party to the proceeding.

In their application, the companies seek Commission approval of changes in their standard service offer for generation service to customers that would go into effect on June 1, 2011 and would extend through May 31, 2014. Generation rates would partly be determined by auctions that would begin in July 2010. The generation requirements of low-income (percentage of income

¹⁶ Motion at 5.

¹⁷ Entry (March 24, 2010).

payment plan, or "PIPP") customers would be excluded from the auction and those customers would receive a 6 percent discount linked to a three-year power supply contract with FirstEnergy Solutions, an affiliate of the companies. The possible generation rate increases paid by large industrial customers, private outdoor light customers, and municipalities for their traffic and street lighting would be limited. Other special generation rate provisions would apply to interruptible customers, large automaker facilities, and colleges.

Distribution rates would be subject to a new rider, effective January 1, 2012. The rider could provide the companies with collections from customers that would reach \$150 million in 2012, \$165 million in 2013, and \$75 million in the first five months (through May 31, an annualized rate of \$180 million) of 2014. Excess amounts not collected from customers in one year could be collected in subsequent years. The average impact on customer rates per kilowatt-hour during 2012 could be as high as 0.296 cents for customers of Ohio Edison, 0.510 cents for Cleveland Electric Illuminating, and 0.356 cents for Toledo Edison. The companies project that residential customers would pay 38 percent of the increases, which would result in a maximum increase of \$57 million in 2012. Collections from customers of all three companies for energy efficiency/demand response programs, including collection for revenues lost as the result of such programs, and for the roll-out of Cleveland Electric Illuminating's "Smart Grid" communications and metering project would be in addition to the collections under the new distribution rider.

A number of non-rate provisions are also contained in the application. These include construction of equipment for large customers, including the Cleveland Clinic. Improvements would result in charges to all customers according to a new economic development rider in tariffs. Additional details may be obtained on the Commission's web page or by contacting the Commission's hotline at 1-800-686-7826.

The deadline for interventions should be extended to the extent necessary to permit new parties to respond to the newspaper notice. While the notice will have to reflect the Commission's timeline for the case, the timeline as currently arranged is unreasonably compressed and is unfair to those interested in the case and contesting the settlement that

FirstEnergy, the PUCO Staff, and others arranged. In any event, FirstEnergy's request for a waiver lacks good cause and should be denied.

2. All Broadly Stated Waiver Requests Should Be Rejected.

FirstEnergy's Motion states several broadly-stated waiver requests that should be rejected. The Commission has previously addressed and rejected the type of "gap-filling," non-specific requests that are contained in FirstEnergy's Motion. Regarding previous waivers sought by FirstEnergy, the Commission stated:

The breadth of this waiver request and the lack of any specificity as to the areas of non-compliance make it impossible for the Commission to find good cause for granting the extension of the general waiver. The Commission cannot grant a waiver where the application has been unable to state the actual company process, program or function that requires the waiver.¹⁸

The Motion seeks broad waivers, without explanation, that undermine the Commission's rulemaking. Again, the Commission should find it impossible to grant these broad waivers.

FirstEnergy seeks a broad waiver from the requirements stated in Ohio Adm. Code 4901:1-35-03(C)(9),¹⁹ a rule related to information on automatic recovery mechanisms, factors impinging on customer shopping, alternative regulation mechanisms, and infrastructure modernization incentives. The Stipulation is filled with major provisions on these topics, including: hundreds of millions of dollars in distribution revenues (in quarterly adjustments) that would not be subject to the normal scrutiny in a

¹⁸ *In re FirstEnergy RSP Proposal*, Case No. 03-2144-EL-ATA, Opinion and Order at 40 (June 9, 2004).

¹⁹ Motion at 4.

distribution rate case;²⁰ a Rider GCR that may turn into a non-bypassable charge that would impinge on shopping;²¹ the collection of lost revenues in connection with energy efficiency and demand response programs without the adjustment that would exist from a distribution rate case;²² an expensive Smart Grid initiative in the Cleveland area;²³ and the potential pass through of certain tax increases in customer rates in the absence of action by the Commission.²⁴ The absence of information on these matters is a major flaw in the Application. The waiver request should be denied as lacking good cause, and information that is vital to the effective and efficient review of the Application should be required.

Similarly, FirstEnergy seeks a broad waiver from the requirements stated in Ohio Adm. Code 4901:1-35-03(C)(10),²⁵ a rule related to information that would assist in the test for significantly excess earnings. Again, the potential for hundreds of millions in additional collections of distribution revenue from customers should demand that the Companies provide the information required in the Commission's rule. The waiver request lacks good cause, and should be denied.

FirstEnergy attached a few documents to its Motion, then broadly requests waiver of Ohio Adm. Code 4901:1-35-03(G) "to the extent that such provision contemplates certain work papers not filed as part of the Companies' Application."²⁶ FirstEnergy's

²⁰ Stipulation at 13-17.

²¹ Id. at 11-12.

²² Id. at 24.

²³ Id. at 22-23.

²⁴ Id. at 30 ("deemed approved if the Commission has not ruled to the contrary within 90 days").

²⁵ Motion at 4.

²⁶ Id.

requested waivers broaden thereafter, including matters “to the extent waiver of the requirements of any other provisions of the Commission’s rules may be required.”²⁷ As discussed above regarding earlier FirstEnergy waiver requests, the Commission has previously stated that broadly-stated waivers will not be granted. FirstEnergy makes no argument whatsoever against the application of the Commission’s policy in this case, and the request for waiver obviously lacks good cause. No waivers should be approved that were not specifically identified and justified by FirstEnergy.

IV. FIRSTENERGY’S REQUEST FOR EXPEDITED TREATMENT AND WAIVER OF OHIO ADM. CODE 4901:1-35-06

Ohio Adm. Code 4901-1-12(C) was intended to provide interested persons an opportunity to submit responsive memoranda under circumstances where a motion involves disputed matters. FirstEnergy states in an opening footnote that “the Application initiating this matter is being filed contemporaneously with [its] Motion [and] formal intervention has not yet been granted”²⁸ As wielded by FirstEnergy, Ohio Adm. Code 4901-1-12(C) has resulted in the issuance of an Entry less than twenty-four hours after the Application and the Motion were filed without the filing of opposing memoranda. The outcome is that Ohio Adm. Code 4901:1-35-06 -- which provides “[i]nterested persons wishing to participate in the hearing . . . *forty-five days* [to

²⁷ Id. at 5.

²⁸ Id. at 2, footnote 1.

intervene] after the issuance of the entry scheduling the hearing”²⁹ -- has been waived, resulting in a period for intervention that is limited to 7 days.³⁰

FirstEnergy’s request for waiver of the rule that permits parties forty-five days to intervene has apparently been granted without any opportunity for opposing argument. Ohio Adm. Code 4901-1-12(F) does not provide for a ruling on such a timeline unless the ruling “will not adversely affect a substantial right of any party.” Intervention is such a substantial right, and an opportunity should have been provided to oppose FirstEnergy’s request.

The undersigned parties oppose FirstEnergy’s request, which lacks good cause. FirstEnergy disturbingly attempts to justify an expedited process for its waiver request, as well as for this proceeding, based upon the ability to “take advantage of historically low market prices.”³¹ That statement contradicts the sworn testimony of FirstEnergy’s own witness on the subject in Case No. 09-906-EL-SSO.³² FirstEnergy’s justification for its waiver requests, and for the need for rapid consideration of this case, is not based upon good cause.

²⁹ Emphasis added.

³⁰ Entry at 3 (March 24, 2010).

³¹ Motion at 5.

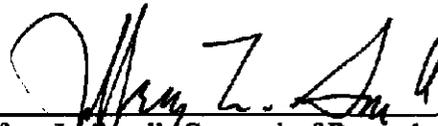
³² FirstEnergy Witness Schnitzer testified that “forward market prices for power to be delivered in future years already reflect the market’s judgment” that electricity prices will increase. *In re FirstEnergy’s MRO Proposal*, FirstEnergy Ex. 13 at 38 (Schnitzer).

V. CONCLUSION

FirstEnergy's specific requests for waivers that are the subject of the foregoing arguments should be rejected. The broadly-stated requests should also be rejected, in part based upon Commission policy (stated in Commission precedent) against such general waivers. As stated above, FirstEnergy's submitted its request without showing good cause. Finally, rulings on FirstEnergy's Motion should await the filing of responsive pleadings.

Respectfully submitted,

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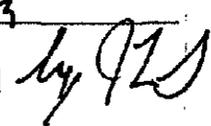


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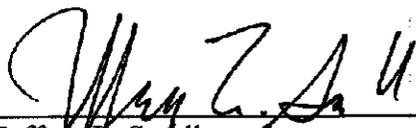
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I hereby certify that a copy of the foregoing pleading was served upon the persons listed below, electronically, this 26th day of March 2010.



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